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8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF ALASKA**  
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11 **David E. Olson, *et al.*,**

12 **Plaintiffs,**

13 **vs.**

14 **Mark O'Brien, *et al.*,**

15 **Defendants.**  
16

**3:11-cv-00245 JWS**

**ORDER AND OPINION**

**[Re: Motion at Dockets 94 & 110]**

17 **I. MOTIONS PRESENTED**

18 At docket 94 defendants Mark O'Brien, James Cantor, and Richard Welsh  
19 (collectively, "Defendants") move to dismiss the complaint of plaintiffs David E. Olson  
20 and Absolute Environmental Services, Inc. (collectively, "Plaintiffs") pursuant to Federal  
21 Rule of Civil Procedure 12(b)(6). Plaintiffs oppose the motion at docket 102, supported  
22 by a declaration from Plaintiffs' counsel at docket 103. Defendants reply at docket 109.  
23 At docket 114 the court authorized Defendants to file a surreply; they did so at  
24 docket 119.

25 At docket 110 Defendants move to strike Plaintiffs' counsel's declaration.  
26 Plaintiffs oppose the motion at docket 113. Defendants reply at docket 118. Because  
27 the court does not rely on Plaintiffs' counsel's declaration, Defendants' motion is denied  
28 as moot. Oral argument was not requested and would not assist the court.

## II. BACKGROUND

The background of this case is set out in the court's order at docket 77 and need not be repeated here. Suffice it to say for present purposes that the Alaska Department of Administration denied Plaintiffs' request for an equitable adjustment to the contract price for the work they performed on the State Office Building ("SOB") in Juneau. Plaintiffs brought an administrative appeal of the denial, which was ultimately denied. Plaintiffs' present complaint alleges that Defendants violated their civil rights by committing various actions that compromised the integrity of the appeal process.<sup>1</sup>

Plaintiffs appealed the administrative decision to the Alaska Superior Court, arguing in part that the agency's decision was procedurally flawed. In pertinent part the Superior Court held that any procedural flaws in the administrative appeal did not deprive Plaintiffs of a due-process-compliant hearing and, substantively, Plaintiffs had no contractual right to recover their additional costs.

Plaintiffs appealed to the Alaska Supreme Court. The Alaska Supreme Court affirmed the Superior Court's conclusion that Plaintiffs lacked a substantive contractual right to recover additional costs. In light of this conclusion, the court refrained from addressing Plaintiffs' procedural claims, holding that Plaintiffs cannot show they were harmed by the procedural issues they identified.

At docket 61 Defendants filed a motion to dismiss Plaintiffs' complaint on claim preclusion and issue preclusion grounds. At docket 77 the court granted the motion, holding that Plaintiffs' complaint was barred by claim preclusion. In light of this holding, the court found it unnecessary to consider Defendants' issue preclusion arguments.<sup>2</sup>

Plaintiffs appealed, and the Ninth Circuit Court of Appeals reversed. The Ninth Circuit noted that an exception to claim preclusion applies "where the party against

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<sup>1</sup>Doc. 1 at 11 ¶¶ 72–82. See generally *id.* at 13 ¶ 84 ("The civil rights violations by Defendants described above caused Plaintiffs to suffer substantial damages.").

<sup>2</sup>Doc. 77 at 4.

1 whom it is asserted ‘lacked [a] full and fair opportunity to litigate his claims.’”<sup>3</sup> The court  
2 held that this exception applies here because Plaintiffs lacked a full and fair opportunity  
3 to litigate their claims for damages regarding the “alleged improprieties in the decision-  
4 making process” of their administrative appeal.<sup>4</sup> The Ninth Circuit remanded the case  
5 to this court for consideration of Defendants’ issue preclusion arguments.

### 6 **III. STANDARD OF REVIEW**

7 Rule 12(b)(6) tests the legal sufficiency of a plaintiff’s claims. In reviewing such  
8 a motion, “[a]ll allegations of material fact in the complaint are taken as true and  
9 construed in the light most favorable to the nonmoving party.”<sup>5</sup> To be assumed true,  
10 the allegations, “may not simply recite the elements of a cause of action, but must  
11 contain sufficient allegations of underlying facts to give fair notice and to enable the  
12 opposing party to defend itself effectively.”<sup>6</sup> Dismissal for failure to state a claim can be  
13 based on either “the lack of a cognizable legal theory or the absence of sufficient facts  
14 alleged under a cognizable legal theory.”<sup>7</sup> “Conclusory allegations of law . . . are  
15 insufficient to defeat a motion to dismiss.”<sup>8</sup>

16 To avoid dismissal, a plaintiff must plead facts sufficient to “state a claim to relief  
17 that is plausible on its face.”<sup>9</sup> “A claim has facial plausibility when the plaintiff pleads  
18 factual content that allows the court to draw the reasonable inference that the  
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20 <sup>3</sup>Doc. 85 at 2 (quoting *Conitz v. Alaska State Comm’n for Human Rights*, 325 P.3d 501,  
21 508 (Alaska 2014)).

22 <sup>4</sup>*Id.* at 2–3.

23 <sup>5</sup>*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

24 <sup>6</sup>*Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

25 <sup>7</sup>*Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

26 <sup>8</sup>*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

27 <sup>9</sup>*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550  
28 U.S. 544, 570 (2007)).

1 defendant is liable for the misconduct alleged.”<sup>10</sup> “The plausibility standard is not akin  
2 to a ‘probability requirement,’ but it asks for more than a sheer possibility that a  
3 defendant has acted unlawfully.”<sup>11</sup> “Where a complaint pleads facts that are ‘merely  
4 consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and  
5 plausibility of entitlement to relief.’”<sup>12</sup> “In sum, for a complaint to survive a motion to  
6 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that  
7 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.”<sup>13</sup>

#### 8 **IV. DISCUSSION**

##### 9 **A. Issue Preclusion**

10 Defendants’ initial motion to dismiss raised both claim preclusion and issue  
11 preclusion. Claim preclusion prohibits a “party from raising any claim or defense in the  
12 later action that was or *could have been* raised in support of or in opposition to the  
13 cause of action asserted in the prior action.”<sup>14</sup> One rationale for this rule is waiver. “If a  
14 party does not raise a claim or a defense in the prior action, that party thereby waives  
15 its right to raise that claim or defense in the subsequent action.”<sup>15</sup> Under the exception-  
16 to-claim preclusion that the Ninth Circuit applied here, a party does not waive her right  
17 to raise a claim in a future action unless she had a full and fair opportunity to raise that  
18 claim in the prior action.<sup>16</sup>

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21 <sup>10</sup>*Id.*

22 <sup>11</sup>*Id.* (citing *Twombly*, 550 U.S. at 556).

23 <sup>12</sup>*Id.* (quoting *Twombly*, 550 U.S. at 557).

24 <sup>13</sup>*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). *See also Starr*, 652  
25 F.3d at 1216.

26 <sup>14</sup>*United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994) (emphasis in original).

27 <sup>15</sup>*Id.* *See also Girdwood Min. Co. v. Comsult LLC*, 329 P.3d 194, 200 (Alaska 2014).

28 <sup>16</sup>*See Conitz*, 325 P.3d at 508.

1 Issue preclusion, on the other hand, does not concern waiver.<sup>17</sup> “Instead, courts  
2 reason that if another court has already furnished a trustworthy determination of a given  
3 issue of fact or law, a party that has already litigated that issue should not be allowed to  
4 attack that determination in a second action.”<sup>18</sup> Issue preclusion applies only where the  
5 litigant had a full and fair opportunity to litigate the issue in the first action.<sup>19</sup>

6 Because the first judgment here was issued by an Alaska court, this court must  
7 apply Alaska law to determine whether issue preclusion bars any of Plaintiffs’ claims.<sup>20</sup>  
8 To determine whether issue preclusion applies under Alaska law, courts apply the test  
9 set out in the Restatement (Second) of Judgments § 27,<sup>21</sup> under which four factors  
10 must be met: “(1) the party against whom the preclusion is employed was a party to or  
11 in privity with a party to the first action; (2) the issue precluded from relitigation is  
12 identical to the issue decided in the first action; (3) the issue was resolved in the first  
13 action by a final judgment on the merits; and (4) the determination of the issue was  
14 essential to the final judgment.”<sup>22</sup> As discussed below, these four factors are met in this  
15 case.

16 **1. Plaintiffs were parties to or in privity with a party to the first action**

17 Plaintiffs concede that this requirement is satisfied.<sup>23</sup> The first action was  
18 brought by North Pacific Erectors, Inc. (“NPE”). Plaintiff David E. Olson alleges that, as

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20 <sup>17</sup>*Shanbaum*, 10 F.3d at 311.

21 <sup>18</sup>*Id.* See also *Wall v. Stinson*, 983 P.2d 736, 740 (Alaska 1999).

22 <sup>19</sup>Restatement (Second) of Judgments § 29 (1982).

23 <sup>20</sup>See *Plaine v. McCabe*, 797 F.2d 713, 718 (9th Cir. 1986) (“[F]ederal courts . . . give  
24 state court judgments the same full faith and credit they would have in the state’s own courts by  
applying the preclusion law of the state in which the judgment was rendered.”).

25 <sup>21</sup>See *Johnson v. Alaska State Dep’t of Fish & Game*, 836 P.2d 896, 906 (Alaska 1991)  
26 (citing Restatement (Second) of Judgments § 27 (1982)).

27 <sup>22</sup>*Jackinsky v. Jackinsky*, 894 P.2d 650, 654 (Alaska 1995).

28 <sup>23</sup>Doc. 102 at 11.

1 the president and sole shareholder of co-plaintiff Absolute Environmental Services, Inc.  
2 (“AESI”), he is the assignee of NPE’s civil rights claims against Defendants.<sup>24</sup> As such,  
3 Plaintiffs are in privity with a party to the first action.

4 **2. Issues decided in the first action are identical to issues in this action**

5 In this action, Plaintiffs essentially reassert the procedural claims that the  
6 Superior Court rejected in the first action. Defendants’ motion asserts that these claims  
7 are barred by issue preclusion because the factual issues upon which Plaintiffs’ claims  
8 rely substantially overlap with factual issues decided by the Superior Court in the first  
9 action,<sup>25</sup> and the legal issue central to this case—whether Defendants’ actions violated  
10 Plaintiffs’ procedural rights—is identical to a legal issue that was decided in the first  
11 action.<sup>26</sup> In response, Plaintiffs argue Defendants have not shown how any of the  
12 factual issues identified in their motion are essential to any elements of Plaintiffs’  
13 claims.<sup>27</sup> Plaintiffs do not dispute, however, that the Superior Court resolved the same  
14 legal issues that they assert in this action. In reply, Defendants do not counter  
15 Plaintiffs’ factual argument by identifying any factual issues decided in the first action  
16 that are necessary to any causes of action alleged here. Instead, they focus on the  
17 Superior Court’s resolution of the essential legal issue in this case.<sup>28</sup>

18 The court finds that the Superior Court decided at least two issues that are  
19 identical to issues raised in this case. First, the court agrees with Defendants that the  
20 Superior Court decided whether Defendants violated Plaintiffs’ procedural rights in the  
21 administrative proceeding. Second, the Superior Court also decided whether  
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23 <sup>24</sup>Doc. 1 at 2 ¶ 3.

24 <sup>25</sup>Doc. 94 at 16.

25 <sup>26</sup>*Id.* at 17.

26 <sup>27</sup>Doc. 102 at 12.

27 <sup>28</sup>Doc. 109 at 4.

1 Defendants' actions in the administrative proceeding harmed Plaintiffs' substantive  
2 rights. Both of these issues are also issues in this action.<sup>29</sup>

3 **3. Whether the Superior Court's determination of these two issues is**  
4 **essential to the final judgment**

5 In order for issue preclusion to apply, the issue determined in the first action  
6 must be essential to the final judgment in that case.<sup>30</sup> "If issues are determined but the  
7 judgment is not dependent upon the determinations, relitigation of those issues in a  
8 subsequent action between the parties is not precluded."<sup>31</sup>

9 Defendants argue that the Superior Court's decisions on Plaintiffs' procedural  
10 claims are essential to the final judgment.<sup>32</sup> This argument is untenable. As the Alaska  
11 Supreme Court's opinion demonstrates, the Superior Court did not need to reach  
12 Plaintiffs' procedural claims because their contractual claims lack substantive merit. In  
13 other words, Plaintiffs would have lost the appeal even if the Superior Court had not  
14 decided their procedural claims. Because the final judgment is not dependent on the  
15 Superior Court's rulings on Plaintiffs' procedural claims, relitigation of those claims is  
16 not precluded.

17 That is not the end of the story, however, because the Superior Court's decision  
18 on the second issue identified above—whether Defendants' actions in the  
19 administrative proceeding caused Plaintiffs any substantive harm—is essential to the  
20 final judgment. That issue was adjudicated in the first action through the court's  
21 rejection of Plaintiffs' contractual claims. As such, the court conclusively determined  
22 that Defendants' procedural actions, no matter how improper they might have been, did  
23 not cause Plaintiffs to suffer substantive harm.

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25 <sup>29</sup>See doc. 1 at 10–11 ¶¶ 69–70; *id.* at 13 ¶ 85 (alleging compensatory damages).

26 <sup>30</sup>See *Smith v. Stafford*, 189 P.3d 1065, 1076 (Alaska 2008).

27 <sup>31</sup>Restatement (Second) of Judgments § 27 cmt. h (1982).

28 <sup>32</sup>Doc. 94 at 24.

1           **4. The issue of harm was resolved in the first action by a final judgment**  
2           **on the merits**

3           Plaintiffs argue that the Superior Court's decision is not a final judgment because  
4 it was appealed to the Alaska Supreme Court.<sup>33</sup> Plaintiffs cite no authority for this  
5 proposition. Plaintiffs' argument lacks merit. Because the Superior Court resolved the  
6 issue of harm by a final judgment on the merits and the Alaska Supreme Court upheld  
7 the lower court's ruling, this factor is satisfied.<sup>34</sup>

8           **B. Defendants' Arguments Regarding The Preclusive Effect of the Previous**  
9           **Judgment**

10          For the most part, Defendants do not address the preclusive effect of the  
11 Superior Court's decision on the issue of harm. Instead, they focus primarily on the  
12 preclusive effect of the Superior Court's decisions on Plaintiffs' procedural claims.  
13 Because Defendants did not adequately brief the issue, the court declines to issue a  
14 comprehensive ruling on the preclusive effect of the Superior Court's decision. One  
15 effect of the Superior Court's judgment is beyond dispute, however. Because the  
16 Superior Court conclusively determined that Defendants' actions did not harm Plaintiffs'  
17 substantive rights, Plaintiffs are barred from recovering compensatory damages under  
18 any of their claims.<sup>35</sup>

19          Defendants do address the issue of harm, however, where they argue that  
20 Plaintiffs' civil RICO claim is barred by issue preclusion because the Superior Court  
21 decided that Plaintiffs did not suffer "a concrete financial injury to business or property  
22 as a result of the [D]efendants' wrongdoing."<sup>36</sup> As Defendants point out, a civil RICO

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23           <sup>33</sup>Doc. 102 at 14.

24           <sup>34</sup>See Restatement (Second) of Judgments § 27 cmt. o (1982).

25           <sup>35</sup>It is unclear what compensatory damages Plaintiffs are seeking. See doc. 1 at 13 ¶ 85  
26 (Plaintiffs allege that they are entitled to recover "all damages direct and consequential,  
27 including without limitation for business devastation, attorneys' fees, expenses and costs  
28 incurred in the administrative hearing, the superior court appeal, and this action.").

<sup>36</sup>Doc. 94 at 19.



1 plaintiff must establish, among other things, “that the defendant caused injury to his  
2 business or property.”<sup>37</sup> Plaintiffs do not respond to this argument. Because Plaintiffs  
3 are barred from relitigating whether they were financially harmed by Defendants’  
4 actions, Plaintiffs’ civil RICO cause of action is barred by issue preclusion.

### 5 **C. Plaintiffs’ Fraud Claim**

6 Finally, Defendants argue that Plaintiffs’ cause of action for fraud fails to state a  
7 claim because Plaintiffs do not plead fraud with particularity.<sup>38</sup> Plaintiffs do not respond  
8 to this argument. The court agrees with Defendants. Alaska Rule of Civil  
9 Procedure 9(b) states that in all averments of fraud “the circumstances constituting  
10 fraud . . . shall be stated with particularity.” Plaintiffs merely allege that unspecified  
11 defendants represented to Plaintiffs at some unspecified time in some unspecified  
12 manner that their administrative claim would be “resolved fairly.”<sup>39</sup> Because Plaintiffs do  
13 not state the circumstances constituting fraud with particularity, their fraud claim will be  
14 dismissed.

## 15 **V. CONCLUSION**

16 For the reasons set forth above, Defendants’ motion at docket 94 is GRANTED  
17 IN PART AND DENIED IN PART as follows: Plaintiffs’ civil RICO and fraud causes of  
18 action are dismissed, and Plaintiffs are precluded from recovering compensatory  
19 damages; in all other respects, the motion is denied. Defendants’ motion at docket 110  
20 is denied.

21 DATED this 16<sup>th</sup> day of March 2017.

22 /s/ JOHN W. SEDWICK  
23 SENIOR JUDGE, UNITED STATES DISTRICT COURT  
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25 <sup>37</sup>See *Fireman’s Fund Ins. Co. v. Stites*, 258 F.3d 1016, 1021 (9th Cir. 2001) (citing 18  
26 U.S.C. § 1964(c)).

27 <sup>38</sup>Doc. 94 at 23 n.128.

28 <sup>39</sup>Doc. 1 at 13 ¶ 81.